Supreme Court, U. S.
F I L E D
DEC 16 1976
MICHAEL RODAK, JR., CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1976

No. 75-6568

JOHNNIE B. HANKERSON,
Petitioner,

v.

THE STATE OF NORTH CAROLINA,
Respondent

BRIEF FOR RESPONDENT

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BRIEF FOR RESPONDENT

CONSTITUTIONAL PROVISION INVOLVED

Constitution of the United States, Amendment XIV:

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

QUESTION PRESENTED

Did the Supreme Court of North Carolina deny the Petitioner due process of law when it declined to apply *Mullaney v. Wilbur*, 421 U.S. 684 (1975) to Petitioner's trial because it took place prior to June 9, 1975?

STATEMENT OF THE CASE

Petitioner shot Gregory Ashe in the heart on the evening of September 29, 1974, around 11:00 P.M. He has never denied the shooting or that there was sufficient evidence developed by the prosecution to establish this fact.

From the beginning, Petitioner has maintained this homicide was not unlawful but, rather, it was justified and excusable because it was done in self defense.

Upon an information, agreed to by Petitioner and counsel, charging him with second degree murder, Petitioner was duly prosecuted on this charge at the November 18, 1974, Session of the Nash County, North Carolina, Superior Court by the District Attorney in a trial to a jury of twelve. Petitioner put on a vigorous defense through cross-examination of the prosecution's witnesses, his own testimony and the testimony of others.

At the end of all the evidence, the trial judge gave the jury elaborate instructions on all elements of the crime and the manner in which the burden of proof was to be allocated. These instructions were in full accord with the North Carolina law as it existed at the time of the trial. The trial judge told the jury it could return one of the three possible verdicts: Guilty of second degree murder; Guilty of voluntary manslaughter or Not Guilty.

The jury rendered its unanimous verdict of guilty of second degree murder in open court.

There is no contention by Petitioner here that the evidence was insufficient to support the verdict.

Following appropriately determined North Carolina law, Petitioner was sentenced to not more than 25 nor less than 20 years imprisonment.

Petitioner, upon review by the North Carolina Court of Appeals, claimed the evidence, as a matter of state law, was insufficient to take the case to the jury. He also asserted there were certain errors in the admission of evidence and in the

trial judge's charge on the elements of self defense.

The North Carolina Court of Appeals, in a three to two decision, rejected Petitioner's contentions and affirmed his conviction and sentence. Because there was a dissent in the Court of Appeals, Petitioner had an appeal as a matter of right to the North Carolina Supreme Court.

Petitioner, upon review by the Supreme Court of North Carolina, in addition to the matters asserted in the Court of Appeals, claimed that the trial judge erroneously allocated the burden of persuasion by requiring him to "satisfy" the jury on the issue of self-defense. The Supreme Court rejected his contentions and affirmed his conviction and sentence.

On October 4, 1976, this Court granted Petitioner's petition for a writ of certiorari to the North Carolina Supreme Court to review that decision as it related to the question of the allocation of the burden of proof.

Further detailed statements of the evidence can be found in Petitioner's Brief and the opinion of the North Carolina Supreme Court. For the sake of brevity, they will not be repeated.

HOW THE CONSTITUTIONAL QUESTIONS WERE PRESENTED AND DECIDED BELOW

Petitioner raised the constitutional issue in a motion filed with the North Carolina Supreme Court on August 19, 1975, to amend the record to note additional Exceptions and Assignments of Error to the trial judge's instructions to the jury which would present for review additional questions suggested in the case of *Mullaney v. Wilbur*, 421 U.S. 684 (1975). The precise question, as stated by Petitioner in his motion below, was:

> "That *Mullaney v. Wilbur* makes unconstitutional the North Carolina rule that the Defendant, to show a justifiable homicide, has the burden of proof to the satisfaction of the jury to establish the defense of self-defense."

SUMMARY OF ARGUMENTS

I and II

THE SUPREME COURT OF NORTH CAROLINA WAS CORRECT IN DECLINING TO APPLY *MULLANEY V. WILBUR* RETROACTIVELY BECAUSE THE INSTRUCTIONS GIVEN BY THE TRIAL COURT DID NOT SUBSTANTIALLY AFFECT THE RELIABILITY OF THE FACT-FINDING PROCESS.

This case does not require automatic retroactivity because jury instructions relating to the allocation of the burden of proof of affirmative defenses do not substantially impair the truth-finding aspect of a criminal trial so as to raise serious questions about the accuracy of guilty verdicts in past trials. Rather, the misallocation of this burden raises only a probability of an incorrect verdict; accordingly, the extent of the reliance on the former rules and the effect on the administration of justice can also be considered. When these other factors are considered, as was done by the North Carolina Supreme Court, prospective application of the new doctrine is the correct result. Limited retroactivity to the case because it was still on direct appellate review is not required.

III

THE LAW OF NORTH CAROLINA COMPORTS WITH THE STANDARDS ANNOUNCED IN *MULLANEY V. WILBUR* AND THE SUPREME COURT OF NORTH CAROLINA ERRED IN APPLYING THESE STANDARDS PROSPECTIVELY.

The North Carolina law required a defendant in a homicide prosecution to prove to the "satisfaction" of the jury his affirmative defense of either heat of passion or self defense. This standard is not as high as the "preponderence of the evidence" standard found to be impermissible in *Mullaney v. Wilbur*. In actuality, all the North Carolina standard requires is that the defendant raise a reasonable doubt in the minds

of the jury. The North Carolina standard provides a desirable and effective means for the trial judge to bring forcefully the defendant's evidence to the jury so that it will carefully consider them.

ARGUMENT

I

THE SUPREME COURT OF NORTH CAROLINA WAS CORRECT IN DECLINING TO APPLY *MULLANEY V. WILBUR* RETROACTIVELY BECAUSE THE INSTRUCTIONS GIVEN BY THE TRIAL COURT DID NOT SUBSTANTIALLY AFFECT THE RELIABILITY OF THE FACT-FINDING PROCESS.

The petitioner in his brief argues, in substance, that the North Carolina Supreme Court erred by refusing to give automatic retroactive effect to the new constitutional due process doctrine announced in *Mullaney v. Wilbur*, 421 U.S. 684 (1975), which prohibits a state from requiring a defendant in a criminal prosecution to prove by a preponderance of the evidence certain affirmative defenses such as heat of passion on sudden provacation or self-defense. He argues this new doctrine, because it substantially impairs the reliability of the fact-finding process, falls within the purview of those cases from this Court which require automatic retroactivity. This being so, according to his argument, the balancing test used in other cases decided by this Court and applied by the North Carolina Supreme Court should not have been considered controlling and it was, therefore, error for the North Carolina Court to have considered the reliance on past decisions and the impact retroactivity would have on the administration of justice in North Carolina and other states with similar rules. The State of North Carolina disagrees with this argument.

A

IN GENERAL

There appear to be two lines of analysis used by this Court in reaching a decision as to whether a new constitutional

doctrine will be fully retroactive or merely prospective. One line states that new rules intended primarily to insure an accurate determination of facts are automatically to be enforced retroactively.[1] Conversely, if the major purpose of the new doctrine is perceived not to be to enhance the judicial truth-finding function, retroactivity is typically denied.[2]

In the other line of analysis, the purpose of the new rule is not considered dispositive. Rather, a balancing test is used to examine the probability that past trials have resulted in inaccurate guilty verdicts.[3] Using this approach "(t)he question whether a constitutional rule of criminal procedure does or does not enhance the reliability of the fact finding process at trial is necessarily a matter of degree."[4] The cases reason that the old rule may not have been the cause of a guilty verdict and they reject "the premise that every criminal trial, or any particular trial, was necessarily unfair because it was not conducted in accordance with what we determined to be the requirements of (the constitution)."[5] In this line of cases the question of whether the old rule infected the fact-finding process is viewed as a "question of probabilities"[6] and thereby avoids the "automatically retroactive" line of analysis. Once this analysis is chosen a "balancing approach," is used,[7] weighing three factors: "(a) the purpose to be served by the new standards, (b) the extent of the reliance by law enforcement authorities on the old standards, and (c) the effect on the administration of justice of a retroactive application of the new standards."[8] In this line of cases, "the purpose to

1 Ivan V. v. City of New York, 407 U.S. 203 (1972) (per curiam), Williams v. United States, 401 U.S. 646 (1971), Arsenault v. Massachusetts, 393 U.S. 5 (1968) (per curiam)

2 e.g., Fuller v. Alaska, 393 U.S. 80 (1968) (per curiam); Linkletter v. Walker, 381 U.S. 618 (1965).

3 e.g., Daniel v. Louisiana, 420 U.S. 31 (1975) (per curiam); Adams v. Illinois, 405 U.S. 278 (1972); De Stefano v. Woods, 392 U.S. 631 (1968) (per curiam)

4 Johnson v. New Jersey, 384 U.S. 719, 728-29(1966)

5 Daniel v. Louisiana, supra at 32.

6 Johnson v. New Jersey, supra supra at page 729

7 Lemon v. Kurtzman, 411 U.S. 192, 199 (1973)

8 Stovall v. Denno, 388 U.S. 293, 297 (1967)

be served by the new constitutional rule" will not automatically decide retroactivity, but it is merely "(f)oremost among these factors."[9]

It is not always clear which line of analysis will be chosen in a given case.[10] For rules intended primarily and perhaps solely to insure a more just determination of facts, this Court has sometimes invoked the "matter of degree" formula rather than the ostensibly more appropriate "automatically retroactive" analysis. Such was the result in *De Stefano v. Woods, supra* in which it was held the *Duncan v. Louisiana*, 391 U.S. 145 (1968) rule, which incorporated the right to a jury trial for serious criminal offense, non-retroactive. *De Stefano* also made *Bloom v. Illinois*, 391 U.S. 194 (1968), which required a right to jury trial for serious criminal contempts, valid prospectively only. The rationale for holding a new rule which changes the trier of fact retroactive must be that a different fact-finder might arrive at a more reliable result.[11] In denying retroactivity, it was assumed that many trials by judges were as fair as if tried by juries and the conclusion was that since the results might have been identical, an analysis of the other factors affecting retroactivity was in order.[12] On the other hand, it appears that the "matter of degree" formula has been ignored in other cases where the trier of fact might or might not have reached a different result had the new standard been in force. In *Ivan V. v. City of New York, surpa*, for example it was noted that an obvious fact-finding purpose was served by substituting the reasonable

9 Desist v. United States, 394 U.S. 244, 249 (1969)

10 Cases that seem to belong in one category are often treated oppositely. Thus McConnell v. Rhay, 393 U.S. 2 (1968) (per curiam), using the absolutist approach, held the right to counsel at the imposition of a deffered sentence to be retroactive while the later case of Adams v. Illinois, supra, using the balancing approach, held the requirement of counsel at a preliminary hearing to be non-retroactive.

11 391 U.S. at 158.

12 392 U.S. at 633-34.

doubt standard for the preponderance of the evidence test in juvenile proceedings for offenses equivalant to a crime.[13] Consequently, *Ivan V.* disposed of the matter with a recital of the "automatically retroactive" line of cases.[14]

In the context of the above, therefore, the State of North Carolina argues that the "automaticially retroactive" line of cases do not apply and that the "matter of degree" or "balancing" line of cases applies because, as noted hereafter, the new doctrine as to burden of proof for affirmative defenses may not produce a dramatic improvement in the fact-finding process.

In this context, the State will now turn to an analysis of the three factors of purpose, reliance and impact.

B

THE PURPOSE FACTOR

As both this Court and the North Carolina Supreme Court have recognized, the purpose of a rule which is deemed to improve the reliability of the fact-finding process will be given the greatest weight in the retroactivity consideration. When it is concluded a new doctrine will improve the fact-finding process, it will often be given retroactive effect because it may disclose that an otherwise innocent person was convicted in the past because the fact-finding process was unreliable.

Prejudice by the finder of fact is less inherent under the North Carolina rules than in *Ivan V.* or *Winship*. Presumably all of the juvenile defendants made eligibile for retrial in *Ivan V.* were again tried before judges. All contested homicide trials

13 Ivan V. held In re Winship, 397 U.S. 358 (1970) retroactive. In these cases, guilt as to all elements of the offense was to be arrived at by the preponderance of the evidence test. The reasonable doubt standard was never applied and a possible harmless error analysis could not be considered.

14 In this area, see the comments of Ostrager, Retroactivity and Prospectivity of Supreme Court Constitutional Interpretations, 19 N.Y. L F. 289 (1973) and a comment in 54 N.C. L. Rev. 1020 (1976)

in North Carolina are before juries.[15] The complicated instructions required by North Carolina law might well, as Justice Lake suggested in his concurring opinion in the case, have resulted in harmless error.[16] Unable to follow the shifting burden in the homicide instructions, juries in the past might well have heeded the apparently overriding instruction to convict only if convinced of guilt beyond a reasonable doubt.[17] Unwilling to convict without proof beyond a reasonable doubt, former juries might have refused to do so thus nullifying the instruction.[18] An exhaustive study has shown that juries often disregard the harshness of rules of law especially in judging self-defense claims.[19] The probability of misunderstanding, of treating to its "satisfaction" to mean "to raise a reasonable doubt" or of nullification of the former instruction by a jury seems to be much higher than that of a judge confusing the standards in pre- *Winship* cases. Thus, there seems to be a lower probability that a defendant was wrongfully convicted under the North Carolina instructions than in the *Winship* situation or under the instructions given by the Maine Court in *Mullaney*.

In summary, as shown above the North Carolina jury instructions do not demand a "per se" or "automatically retroactive" result because of the purpose factor.

15 N.C. Constitution, Art. I., Sec. 24 "*Right of jury trial in criminal cases*. No person shall be convicted of any crime but by the unaminous verdict of a jury in open court."

16 288 N.C. at 659-60, 220 S.E. 2d at 594, A. 40. This analysis is more fully developed in Argument III following.

17 See the study on jury perceptions of trial judge's instructions in Gordon & . merlin, *Forensic Psychology: The Judge and the Jury*, 52 JUDICATURE 328, (1969)

18 H. KALVEN & H. ZEISEL, THE AMERICAN JURY, 182-90 (1966) (juries have a higher standard of "beyond a reasonable doubt" than do judges and are less likely to convict.

19 Ibid.

C

THE RELIANCE FACTOR

Until the decision in *Mullaney*, there was absolutely no hint from this Court in its prior decisions that the states were not free to place some burden of proof as to affirmative defense on a defendant in a criminal trial. The early case of *Davis v. United States*, 160 U.S. 469 (1895) was limited to questions of insanity in criminal prosecutions in federal Courts. The later case of *Leland v. Oregon*, 343 U.S. 790 (1952), held that an Oregon rule placing the burden of proof on the defendant to prove insanity beyond a reasonable doubt comported with due process and again explicitedly limited *Davis* to the federal courts. And the intervening case of *Morrison v. California*, 291 U.S. 82 (1934), held that the burden of persuasion on an issue in dispute may be shifted to the defendant when the prosecution has made out a case that "has at least a sinister significance"[20] so as to justify forcing the defendant to negate or establish an excuse or explanation for what has been proved. *In Re Winship*, did not purport to deal with affirmative defenses; the due process violation there was the lack of *any* reasonable doubt standard in juvenile trials in New York. Until *Mullaney*, therefore, the states were free to allocate the burden of proof in criminal prosecutions in any manner they deemed wise. In reliance on this fact North Carolina allocated to the defendant the burden, in homicide prosecutions, of satisfying the jury as to heat of passion and self defense.

Moreover, as the North Carolina Supreme Court noted in its opinion, the North Carolina rules have been firmly settled for well over one hundred years and they were firmly rooted in Common Law procedures.[21]

The State of North Carolina submits that the reliance factor clearly militates in favor of non-retroactivity. Accordingly, the North Carolina Supreme Court was entirely correct in this aspect of its opinion.

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20 291 U.S. at page 90

21 288 N.C. at 654, 220 S.E. 2d at 590, A.38.

D

THE IMPACT FACTOR

The Supreme Court of North Carolina identified, as of June 30, 1975, 269 inmates in its Department of Corrections who had been convicted of first degree murder and 728 inmates who had been convicted of second degree murder.[22] If *Mullaney* is held retroactive, potential retrials might be required in those second degree murder cases where the defendant raised an affirmative defense of either heat of passion or self-defense.[23] It would not, obviously, apply to those cases where the defendant entered a guilty plea or relied on any other defense than heat of passion or self-defense.[24] The statistics available do not permit identification of the numbers involved in the suspect category. Retrial of these unknown numbers would put a considerable burden on the State of North Carolina.

More significantly, however, would be the impact of a retroactive application on other states. The North Carolina Supreme Court, in its opinion, noted that at least fifteen jurisdictions require the defendant in a homicide prosecution to carry the burden of persuasion for self-defense or heat of passion.[25] Two of those fifteen, Ohio and Pennsylvania, and three others not included in the fifteen, Illinois, Kentucky and Missouri, put the burden on defendants for one or both issues

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22 288 N.C. at 654, 220 S.E. 2d at 591, A. 38.

23 It would seem, in light of the exhaustive analysis of Evans v. State, 349 A. 2d 300 (Md. App. 1975), that first degree murder convictions would not be affected by Mullaney since the elements of premeditation and deliberation would have been proved beyond a reasonable doubt and thus render any Mullaney error harmless beyond a reasonable doubt. 349 A. 2d at 12-20.

24 North Carolina has never put any burden, other than the production burden, on the defendant in regard to alibi. See, e.g. State v. Minton, 234 N.C. 716, 68 S.E. 2d 844, 31 A.L.R. 2d 682 (1952)

25 288 N.C. at 654-55; 220 S.E. 2d at 591, A. 39.

in assault cases.[26] The number of persons who would benefit from retroactive application of *Mullaney* in these other states would thus seem to be higher than in North Carolina, which has never shifted the burden in assault cases.[27] Futhermore, if the *Mullaney* principle is to be extended to other affirmative defenses, other states, including North Carolina, might face retrial of large numbers of convicted felons.[28]

The potential impact of a retroactive application of *Mullaney* would be great indeed.

ARGUMENT

II

THE SUPREME COURT OF NORTH CAROLINA WAS CORRECT IN DENYING LIMITED RETROACTIVITY TO *MULLANEY*.

The Petitioner argues here that since his case was on direct appeal as a matter of right on the date that *Mullaney v. Wilbur* was decided the North Carolina Supreme Court should have given him the benefit of its doctrine and ordered a new trial. The State disagrees and argues its Supreme Court was entirely correct in denying limited retroactivity.

Initially, it should be noted the case is before this Court, as it was before the North Carolina Supreme Court, in a

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26 Shepherd v. Commonwealth, 306, 306 Ky. 121, 206 S.W. 2d 485 (1947); State v. Davis, 342 Mo. 594, 116 S.W. 2d 110(1938); State v. Powers, 98 Ohio App. 365, 129 N.E. 2d 653, appeal dismissed, 162 Ohio St. 431, 123 N.E. 2d 406 (1954); Commonwealth v. Noble, 371 Pa. 138, 88 A. 2d 762 (1952). See generally 6A C.J.S. Assault & Battery §115 (1975).

27 State v. Warren, 242 N.C. 581, 189 S.E. 2d 109(1955)

28 Several recent commentators have advocated such an extension. Sec, e.g., 11 Harv L. Rev. 429 (1976) and 27 Syracuse L. Rev. 834 (1976). North Carolina also puts the burden of proof to the "satisfaction of the jury" on defendants who assert entrapment, State v. Cook, 263 N.C. 730, 140 S.E. 2d 305 (1965) or mistake of fact N.C. PATTERN INSTRUCTIONS CRIM. 306.10(Mar. 1975). The numbers in these categories are unknown.

somewhat peculiar procedural posture. The case was tried at the November 11, 1975, Session of the Nash County, North Carolina, Superior Court. (A. 1) Judgment was entered by the trial judge on November 21, 1974. (A. 1) The case was argued orally in the North Carolina Court of Appeals on May 29, 1975. (A. 1) At this point in time no one involved in the case could have known that about two weeks later, on June 9, 1975, *Mullaney v. Wilbur*, would be announced establishing a new constitutional due process standard applicable to the the states concerning the placement burden of proof as to affirmative defenses in homicide prosecutions. At the time the case was tried, appealled, briefed and argued in the first appellate court level, no error in applying the State allocation of the burden of proof existed which could have been made the basis of an exception and assigned as error. So also, there was no federal constitutional doctrine applicable to the states which would have required the trial judge to allocate the burden of proof differently than was actually done in his instructions. Because of the lack of any overriding federal constitutional standard, the trial judge correctly applied the longstanding North Carolina rules and the Petitioner quite properly took no exception thereto.

The Court of Appeals filed its decision and opinion in the case July 16, 1975, slightly over a month after the *Mullaney* decision was announced on June 9, 1975. The North Carolina Court of Appeals did not consider the new *Mullaney* doctrine in its opinion because no such question was presented to it by the Petitioner in his brief or in his exceptions and assignments of error set forth in the record before the Moreover, Petitioner, after the date *Mullaney* was announced, never moved before the Court of Appeals for leave to amend the record to reflect additional exceptions and assignments of error as to the incorrect allocation of the burden of proof, and for the opportunity to file additional briefs and oral argument. Not having the issue before it, the Court of Appeals, filed its majority opinion along with the dissent by Judge Arnold on the issue of the sufficiency of the evidence. This issue was, of course, raised by the Petitioner before that court; in fact, it was his major contention. The dissent on a question unrelated to any *Mullaney* problems was what created the right of direct appeal to the Supreme Court of North Carolina. N.C.Gen. Stat. 7A-30(2).

It was only after the Notice of Appeal was filed that Petitioner, for the first time, on August 19, 1975, moved for leave to amend the record on appeal to raise *Mullaney* issues. (A. 2) The Supreme Court granted this motion on September 2, 1975, eight days before oral argument on the case September 10, 1975. (A. 2)[29]

This background, of course, is not determative of the issue of whether the new doctrine should have been applied because the case was still on direct appellate review as a matter of right. The State of North Carolina argues that the later decisions of this Court in no way require application of new constitutional doctrines to cases which are still pending on direct appellate review as a matter of right. Thus in *Desist v. United States*, supra, this Court refused to apply the doctrine announced in *Katz v. United States*, 389 U.S. 347 (1957), to petitioner *Desist* even though his case was still pending on direct appellate review at the time. *Desist* gave *Katz* a completely prospective operation Rejecting the Petitioner's argument for limited retroactivity as to him because his case was still pending on direct appellate review on the date *Katz* was decided, the Court noted:

> "Petitioners point out that in Linkletter, the only other case involving the retroactivity of a Fourth Amendment decision, the Court held Mapp applicable to every case still pending on direct review on the date of that decision A similar approach was adopted in Tehan v. Shott, 382 U.S. 406, with respect to the prospectivity of Griffin v California, 380 U.S. 609. In Johnson v. New Jersey, 384 U.S. 719, however, we abandoned the approach taken in Linkletter and

29 The State has no quarrel with the way the case and issues were handled in the state appellate process. Manifestly, Petitioner's counsel probably did not learn of Mullaney and realize its significance until after the Opinion of the Court of Appeals was filed. Realizing he had an appeal as a matter of right, he promptly raised the issue then. The Supreme Court, anxious to give guidance to trial judges, seized this case as an appropriate vehicle to do so.

> Tehan and concluded that 'there are no jurisdictional or constitutional obstacles' to the adoption of a different cut-off point. Id. at 733'. "[30]

Further in the same opinion, it was noted "(a)ll of the reasons for making Katz retroactive also undercut any distinction between final convictions and those still pending on review."[31] and "(n)or can it be sensibly be maintained that the Court is foreclosed by Linkletter in this case, as it was not in Johnson, simply because Katz, like Mapp, was a Fourth Amendment decision."[32] To the same effect is *Kaiser v. New York*, 394 U.S. 280 (1969). Both of these cases were relied on by the North Carolina Supreme Court in its opinion.[33]

From these decisions as well as *Michigan v. Payne*, 412 U.S. 47 (1973), which held it to be error for a state court to apply a decision of this Court retroactively when later this Court determined the decision to be prospective only, it seems clear that even limited retroactivity is not compelled.[34] These same cases would also seem to deny limited retroactive application of the *Mullaney* doctrine to the unknown numbers of other cases which were on direct appeal on June 9, 1975, in North Carolina.

ARGUMENT

III

THE LAW OF NORTH CAROLINA CONCERNING THE BURDEN OF PROOF TO BE PLACED ON DEFENDANTS IN HOMICIDE

30 394 U.S. at 252.
31 Id. at 253.
32 Id. at 253.
33 288 N.C. at 652, 220 S.E. 2d at 590, A. 36.
34 Obviously, if Mullaney is held to be retroactive by this Court, then the Supreme Court of North Carolina would have been wrong in its prospectively only ruling. In the decisions to date, however, there is nothing which requires a holding of limited retroactivity on this case until a ruling is made deciding the retroactivity or prospectivity of Mullaney.

PROSECUTIONS WHO ASSERT AFFIRMATIVE DEFENSES OF HEAT OF PASSION AND SELF DEFENSE FULLY COMPORTED WITH THE DUE PROCESS STANDARDS ANNOUNCED IN *MULLANEY V. WILBUR* AND ITS SUPREME COURT ERRED IN HOLDING THIS LAW PROSPECTIVELY INVALID.

The longstanding rules in North Carolina regarding the burden of proof imposed on the defendant in affirmative defenses of heat of passion or self-defense require him to establish these defenses to the satisfaction of the jury. What is meant by satisfying the jury has never been clearly defined although, as developed by the following analysis and recognized by the Supreme Court of North Carolina in *Hankerson*,[35] it has never required proof by a preponderence of the evidence. The State of North Carolina argues that it merely requires the defendant to raise a reasonable doubt. If all it requires is that the defendant raise a reasonable doubt then it would seem to comport with the due process standards announced in *Mullaney* which finds nothing constitutionally impermissible in requiring a criminal defendant to bear the burden of producing some evidence sufficient to raise a reasonable doubt.[36]

The North Carolina Supreme Court's Construction and definition of the meaning of the term "satisfaction of the jury" does not preclude the State of North Carolina from making this argument.[37] As construed in *Hankerson*, "(s)atisfying the jury . . . means . . . a standard no greater and at the same time one not significantly less than persuasion by a preponderance of the evidence. Satisfying the jury means that there must be some evidence offered of all elements of heat of passion on sudden provocation or of self-defense, as the case

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35 288 N.C. at 648, A. 32.

36 421 U.S. at 703, n. 31.

37 Ordinarily, the state court's definition of its law will be biding, e.g., Winters v. New York, 333 U.S. 507 (1948) except in extreme circumstances. Bowe v. City of Columbia, 378 U.S. 347 (1964).

may be, and that this evidence must satisfy or persuade the jury of the truth of the existence of these provocations - one which robs the crime of malice and the other which excuses it altogether."[38] It can be seen that as construed, the concept requires the defendant to bear the production burden on all elements of the two affirmative defenses sought to be established. As construed, it also puts some persuasion burden on the defendant. It is the extent of the persuasion burden that is crucial.

The question then becomes did the North Carolina instructions, by telling the jury that it must be satisfied that the petitioner acted in the heat of passion on sudden provocation or in self-defense, impermissibly relieve the prosecution of its burden of proving malice and unlawfulness and place this burden of persuasion as to the non existence of these elements on the Petitioner. To resolve this question, an examination of what is meant by telling the jury, in accordance with the long settled North Carolina rule, that it must be satisfied is required

This language as used in the instructions given here does not mean the jury must be persuaded by a preponderance of the evidence that malice does not exist, that the heat of passion on sudden provocation does exist, or that the elements of self-defense do exist. The Maine jury instructions found wanting in *Mullaney* clearly placed upon the defendant the burden to show that it is more probable than not, or by a fair preponderance of the evidence, that the defendant killed in the heat of a sudden passion. Maine followed the landmark case of *Commonwealth v. York*, 9 Met (50 Mass.) 93 (1845). This Court seems to have regarded this aspect of the Main jury instruction as being primarily offensive when it observed:

> "Under this burden of proof a defendant can be given a life sentence when the evidence indicates that it is *as likely as not* that he deserves a significantly lesser sentence. This is an intolerable result. . . ."[39]

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38 288 N.C. at 648, A. 32.

39 Mullaney v. Wilbur, supra at 703.

The North Carolina burden of proof on a defendant to show heat of passion or self-defense is decidedly and purposefully different in that the quantum of proof is simply to the "satisfaction" of the jury–not by the greater weight of the evidence nor beyond a reasonable doubt. *State v. Freeman*, 275 N.C. 662, 170 S.E. 2d 461 (1969). This standard was not invented by North Carolina. It was standard recognized by expositors of the common law:

> "(W)e may take it for a general rule that all homicide is malicious, and of course amounts to murder, unless where *justified* by the command or permission of the law; *excused* on the account of accident or self-preservation; or alleviated into manslaughter, by being either the involuntary consequence of some act, not strictly lawful, or (if voluntary) occasioned by some sudden and sufficiently violent provocation. And all these circumstances of justification, excuse, or alleviation, it is incumbent upon the prisoner to make out, "to the satisfaction of the court and jury" (Emphasis supplied): the latter of whom are to decide whether the circumstances alleged are proved to have actually existed; the former, how far they extend to take away or mitigate guilt. For all homicide is presumed to be malicious, until the contrary appeareth upon evidence." 4 W. Blackstone Commentaries *201.

As noted in *Mullaney*,

> "In a landmark case, *Commonwealth v. York*, 9 Met (50 Mass) 93 (1845) Chief Justice Shaw of the Massachusetts Supreme Judicial Court held that the defendant was required to negate malice aforethought by proving by a preponderance of the evidence that he acted in the heat of passion."[40]

This Court rejected *York's* rule for use in federal courts in *Davis v. United States, supra*, giving this reason:

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40 Id. at 694.

> "We are unable to assent to the doctrine that in a prosecution for murder, the defense being insanity, and the fact of the killing with a deadly weapon being clearly established it is the duty of the jury to convict where the evidence is *equally balanced* on the issue as to the insanity of the accused at the time of the killing."[41]

This was precisely the reason given 80 years later in *Mullaney*.

North Carolina has never followed *York*; rather, proceeding along the lines of the dissent in *York* and the later case of *Commonwealth v. Hawkins*, 3 Gray (69 Mass.) 463 (1855). In *State v. Ellick*, 60 N.C. 450 (1864) it was held that a defendant need not make out his affirmative defense or matters in mitigation beyond a reasonable doubt but simply to the satisfaction of the jury. In *State v. Willis*, 63 N.C. 26 (1868) the North Carolina Court considered *York* and explicitly rejected that portion of the *York* opinion which placed the burden on the defendant to make out his affirmative defense or matters in mitigation by a preponderance of the evidence, noting:

> "We prefer to stand *super antiquas vias*, and to adhere to the rules laid down in the *State v. Ellick*, above referred to. In that case the erroneous statement which we had inadvertently made in the *State v. Peter Johnson*, (48 N.C. 266 (1855)) that it was incumbent on the prisoner to establish the matters of excuse or extenauation beyond a reasonable doubt, is corrected. In it is also corrected what we consider as erroneous in the decision of the Court in *Commonwealth v. York*, that the matters of excuse or extenuation which the prisoner is to prove, must be decided according to the preponderance of evidence. It is more correct to say, as we think, that they must be proved to the satisfaction of the jury."[42]

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41 160 U.S. at 484 (Emphasis added)

42 63 N.C. at 29

Although there has been *language* in several of the later North Carolina cases to the contrary, Stansbury's North Carolina Evidence § 214, n. 48 (Brandis Rev. 1973), e.g., *State v. Freeman, supra*, it *has held* that the burden on the defendant is not by the preponderance of the evidence, *State v. Barrett*, 132 N.C. 1005, 43 S.E. 832 (1903), nor any greater standard, *State v. Freeman, supra. State v. Carland*, 90 N.C. 668 (1884), holding to the contrary, erroneously purported to follow *Willis* and was overruled *sub silentio* in *State v. Barrett, supra*.

In *Barrett* the judge's instruction on burden of proof was basically that used in Maine. Although reversing for other errors, this aspect of the charge was strongly criticized as not in accord with prior cases, the court saying:

> "(T)he prisoner must satisfy the jury, neither beyond a reasonable doubt nor yet by a preponderance of testimony, but simply satisfy them, of the existence of facts and circumstances which mitigate the offense or which make good a plea of self-defense."[43]

"Satisfying" the jury of the existence of certain facts therefore does not mean that defendant must prove their existence by a preponderance of the evidence.

Accordingly, the crucial difference between the jury instructions given here and those given in Maine which were struck down in *Mullaney* are: upon proof beyond a reasonable doubt of an assault with a deadly weapon resulting in death, and the unlawfulness of the killing, and evidence of all elements of heat of passion on sudden provocation a jury under the Maine instructions would be required to return a verdict of guilty of murder unless it could find *affirmatively* by a preponderance of the evidence that the killing was done in the heat of passion on sudden provocation; whereas under the approved instructions in North Carolina even if no such *affirmative* finding was made the jury could not return a verdict of guilty of murder in the second degree unless the State, aided by the inference of malice arising from the use of a deadly weapon, proved malice beyond a reasonable doubt. Thus it can be concluded that the defendant's burden to "satisfy" the jury

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43 132 N.C. at 1013.

of the jury of the existence of heat of passion taken in the context of the entire instruction means only that the evidence of heat of passion on sudden provocation must be sufficient to raise a reasonable doubt in the minds of the jury as to the existence of malice. This conclusion is required in order to give appropriate effect to those portions of the instructions which unequivocally and repeatedly place upon the State the burden to prove malice beyond a reasonable doubt. Likewise inasmuch as the State here was required to prove the absence of justification or excuse, i.e., unlawfulness beyond a reasonable doubt, the defendant's burden to "satisfy" the jury of the existence of self-defense means only that the evidence of self-defense must be sufficient to raise a reasonable doubt as to the existence of unlawfulness.

While the terminology of these instructions may allocate some burden of persuasion to defendant it does not follow that the allocated burden is therefore constitutionally impermissible. This Court recognized in *Mullaney v. Wilbur, supra*, n. 20, that the North Carolina rules have "blurred the distinction between" the production burden and the persuasion burden. Any so called blurring does not arise from failure to recognize the difference between producing evidence and persuading the jury but rather from the constitutional insignificance of the distinction between requiring a defendant to produce evidence which is capable of belief by a jury and which tends toward innocence or mitigation (tacitly approved in *Mullaney*), and requiring him to persuade a jury that there is a "doubt based on reason and common sense arising out of some or all of the evidence that has been presented, or lack of evidence as the case may be, as to any fact necessary to constitute (his) guilt."

While there may be words in the instruction such as "if you find that the defendant acted . . . in self-defense, he would not be guilty" and "the defendant must satisfy you" which, isolated, might seem to place some burden of proving affirmatively the presence of self-defense or heat of passion, when placed in contex of other pertinent provisions of the instructions, they do not. *See Cupp v. Naughten*, 414 U.S. 141 (1973). *Cupp* arose from an Oregon criminal prosecution in which the defendant put on no evidence. Twice the court charged that the defendant was presumed innocent until proven

guilty beyond a reasonable doubt. The judge also charged on an Oregon permissive inference that witnesses were presumed to speak the truth. Defendant claimed this latter instruction impinged unconstitutionally on the presumption of innocence and the prosecution's burden of proof beyond a reasonable doubt. In rejecting the claim this Court said:

> "Certainly the instruction by its language neither shifts the burden of proof nor negates the presumption of innocence accorded under Oregon Law. It would be possible perhaps as a matter of abstract logic to contend that any instruction suggesting that the jury should believe the testimony of a witness might in some tangential respect 'impinge' upon the right of the defendant to have his guilt proved beyond a reasonable doubt. But instructions bearing on the burden of proof, just as those bearing on the weight to be accorded different types of testimony and other familiar subjects of jury instructions, are in one way or another designed to get the jury off dead center and to give it some guidance by which to evaluate the frequently confusing and conflicting testimony which it has heard. The well-recognized and long-established function of the trial judge to assist the jury by such instructions is not emasculated by such abstract and conjectural emanations from *Winship*." Id. at 148-149.

So in this case, even if those challenged portions of the instruction, in isolation, may "as a matter of abstract logic . . . impinge on the right of the defendant to have his guilt proved beyond a reasonable doubt," taken in context of the full charge they are designed simply, and constitutionally, to guide the jury in evaluating whether the State has proven guilt beyond a reasonable doubt. It was this aspect of the North Carolina instructions which were not fully considered by its Supreme Court in its opinion.

Not only do these instructions comport with the Due Process Clause of the Fourteenth Amendment, they also enunciate principles that are supported by compelling policy considerations. The reasonable doubt standard in criminal cases

is erected in favor of the life and liberty of innocent defendants. To place no burden on a criminal defendant charged with homicide to raise even a reasonable doubt as to the existence of malice or unlawfulness upon proof that he intentionally shot another person which shooting proximately resulted in that person's death would be to favor death to the victim and injustice to the State. This is so because a homicide victim can never himself shed light on the circumstances surrounding the killing. One can think of no rule which would more inevitably lead to undersirable results that one which requires instructing a jury that it must acquit a homicide defendant who produces some evidence of mitigation or justification whether or not that evidence is enough or "satisfies" it that there is a reasonable doubt as to malice or unlawfulness. Giving the defendant the burden of raising a reasonable doubt is an approved rule in a number of jurisdictions. *DeGrott v. United States*, 78 F2d, 244, 251 (9th Cir. 1935) (synthesizing *Davis v. United States, supra*, and *Matheson v. United States*, 227 U.S. 540 (1913)); *Spence v. Territory*, 13 Ariz. 20, 108 P. 227 (1910); *Everett v. State*, 88 Ariz 293, 356 P. 2d 394 (1960); *State v. Dill*, 282 S.W. 2d 456 (Mo. 1955); *State v. Harrison*, 81 N.M. 623, 471 P. 2d 193 (Ct. App. 1970); *State v. Hazlet*, 16 N.D. 426, 113 N.W. 374 (1907); see annot., 43 A.L.R. 3d 221 (1972), especially §§ 3(f) and 4(b).

The preponderence of the evidence test used by Maine and a number of other jurisdictions required the jury, in the event their minds were evenly balanced between conviction and acquittal, to convict. This was the constitutionally impermissible part of the Maine instructions. By contrast the North Carolina standard allows the jury to acquit in the equally balanced situation. Conceivably, it could also result in acquittals when the balance might be tipped slightly in favor of the prosecution but not so far as to pass the beyond a reasonable doubt burden that is required to be repeatedly placed on the prosecution by the North Carolina law. By having no precise definition of the amount of evidence required to satisfy it, the jury is free to weigh the defendant's evidence in any manner it chooses; it is never required to find the defendant's evidence must preponderate or be evenly balanced to that opposed to it before any acquittal can result.

The same is true when the jury is told they can acquit if the prosecution has not proved its case beyond a reasonable

doubt. Again, the jury is left free to give whatever weight it deems appropriate to the evidence produced by the defendant in its sole and unbridled discretion. It seems there is nothing constitutionally impermissible in allowing juries or other fact-finders great lattitude in applying the "less than a reasonable doubt" standard nor in requiring defendant to produce sufficient evidence to raise a reasonable doubt. In any criminal trial conducted in North Carolina, the jury is always told the prosecution must prove its case beyond a reasonable doubt and that it must acquit if the prosecution fails to carry this burden. It is only in a fairly limited number of trials (homicide of less than first degree) that the "satisfaction" standard even comes into a trial. Thus, if the wide discretion allowed to the jury in all cases other than less than first degree homicide prosecutions comports with all due process notions, then surly similar wide discretion given to the jury by the "satisfaction" test would also pass constitutional muster.

Moreover, a rule of law which requires the trial judge to affirmatively instruct on the defendant's evidence so that the "satisfaction" test can be stated and applied benefits the defendant. First, the defendant's evidence is recapitulated and restated to the jury just before they retire to deliberate so that it is fresh on their mind. Second, they are told affirmatively that the law requires them to consider this evidence and that it cannot be ignored. Merely instructing that the prosecution must prove its case beyond a reasonable doubt or that an acquittal must be granted if the jury has a reasonable doubt puts the focus and emphasis on the prosecution's evidence or lack thereof and tends to relegate the defendant's evidence to a secondary role. In its deliberations, the jury may well ignore the defendant's evidence in its efforts to discern whether the prosecution's evidence meets the reasonable doubt standard. Thirdly, the jury is told it merely has to be satisfied by the defendant's evidence with no mention being made of any further requirement. Satisfaction is a word of ordinary usage as opposed to a word of art (such as "malice" or "reasonable doubt") whose meaning is clear to most people who would be sitting as jurors. Thus they are given a comprehensible standard to apply when considering the defendant's evidence. As a practical matter, unless the jury or other fact-finder is satisfied from the defendant's evidence of the truth of the existence of all the elements of either heat of passion or

self-defense (regardless of whatever formula the trial judge uses in his instructions) guilt will be found. Thus, in the final analysis, mere semantical differences in a trial judge's instruction result in few, if any, changes in ultimate result.

The State of North Carolina feels that the longstanding instructions requiring the jury to be "satisfied" fully comported with federal due process. The "fine tuning" of due process notions done by this Court in *Mullaney* involving rules in Maine should not work to invalidate North Carolina's markedly different rules. Until this Court, which is the only body which can authoritatively declare the reach of its decisions, says directly and unequovicably that North Carolina's rule violates due process as recently redefined in *Mullaney*, the North Carolina Supreme Court's interpretation and application of *Mullaney* is not dispositative of the question. Therefore, the State of North Carolina urges this Court to examine the applicability of the *Mullaney* standards to this state.

Furthermore the North Carolina Supreme Court, in its haste to remove any constitutionally suspect rules from its law, may have overlooked the recent admonitions from this Court of "the importance of allowing the States to experiment and innovate especially in the area of criminal justice." and "that neither the Constitution as orginally drafted, nor any amendment, nor indeed any need, dictates that we must have absolute uniformity in the criminal law in all the States".[44] By adopting the "satisfaction" test, which seemingly has worked well in North Carolina for over one hundred years, this state has in fact innovated and experimented. In all this time, this approach was never questioned. *Mullaney* has not questioned North Carolina's approach; rather, striking down a Maine rule which could have never survived even a moment's scrutiny by the North Carolina Courts.

For all of the above reasons, therefore, it is most earnestly submitted that the North Carolina Supreme Court erroneously perceived the sweep of *Mullaney* and thereby incorrectly applied it invalidate, albeit prospectively, a constitutionally acceptable standard.

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44 California v. Green, 399 U.S. 149, 171 (1969) (Chief Justice Burger concurring.)

CONCLUSION

To date, the decided cases of this Court do not require an automatically retroactive application of the new due process standards as to allocation of the burden of proof on the affirmative defenses of heat of passion on sudden provocation and self-defense. The three factor analysis of purpose, reliance and impact should be used to resolve the retroactivity question, when this is done, the reliance and impact factor outweigh the purpose factor and thereby require a prospective only application of the new due process standard.

In no event do the decided cases demand a limited retroactive application to the case because it was still on direct appellate review as a matter of right.

Finally, the Supreme Court of North Carolina may have been in error by holding that the new standard, even prospectively, had any application to the existing North Carolina Rules.

For these reasons, therefore, the State of North Carolina feels that the decision of its Supreme Court refusing to apply *Mullaney* retrospectively in any manner was entirely correct. The State further feels that the *Mullaney* doctrine should have never been applied since its rules fully comported with the new standard.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I am admitted to practice law before the Supreme Court of the United States; that I have served copies of the within BRIEF FOR RESPONDENT by depositing three copies of same in the United States Mail at Raleigh, North Carolina, addressed to: Lawrence G. Diedrick, P. O. Box 2626, Rocky Mount, North Carolina 27801, first class postage prepaid.

This the 15th day of December, 1976.

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